92-1766

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PAUL BRICKNER,
Petitioner

versus

GEORGE V. VOINOVICH, GOVERNOR; CHESTER A. ROUSH; WILLIAM L. PHILLIS; individually and in their official capacities, and their agents, employees, attorneys, successors in office, assistants and all persons acting in concert and cooperation with them,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(*Petitioner is not proceeding in forma pauperis. Petitioner has been a member of the bar of this Court since 1982.)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the removal from office of a member of the State Board of Education in his ninth year of service by means of two Attorney General opinions, one published and formally issued upon the request, made by motion and vote, of the State Board of Education, the other unpublished and issued upon the secret telephone request (not a written request) of the Superintendent of Public Instruction, by undisclosed legal advice provided in secret by the Attorney General to the Governor and by an appointment by the Governor of another person to the seat occupied by the elected member, rather than by following the quo warranto procedure specified in the Constitution and laws of Ohio, constitutes a violation of federally protected due process rights.

2. Whether the interpretation of the language of Section 3301.031, Ohio Revised Code, by the Ohio Attorney General, is unconstitutional in that it makes government employees second class citizens by an unconstitutional prohibition on their eligibility to serve on the State Board of Education, without rational basis, thereby denying government employees equal protection of the law.

3. Whether the language of Section 3303.031 O.R.C. precluding from membership on the State Board of Education persons who "hold any other public position of trust or profit...." is unconstitutionally vague.

4. Whether the respondents violated petitioner's First Amendment rights by punishing him for speaking out and asking question about matters clearly within the purview of his responsibilities and

duties as a member of and president of the State Board of Education.

5. Whether petitioner's removal in midterm, during his ninth year in office, violated the right of petitioner and other electors of the 11th Congressional District to chose their representative, in that the Attorney General and Governor selectively enforced a novel interpretation of a code provision that existed for 36 years and had never before been used to remove any of the many Board members who held full-time or part-time government positions, or any of the other Board members who held public positions of trust or profit, as broadly defined by the Attorney General, at the time petitioner was singled out for removal.

6. Whether the supremacy clause and the Hatch Act preclude any state action to define or prohibit what public service

activities may be performed by federal government employees.

7. Whether the District Court and Court of Appeals abused their discretion in not affording injunctive relief and reinstatement and in not granting petitioner's motion for a new trial and for leave to amend his complaint.

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safeguarded by the Constitution of the United States.

Ib. Removing an elected official and then lacing on that former official the burden of proof and the burden of going forward in seeking reinstatement violate due process.

Ic. The Governor and Attorney General should have recused themselves from serving as "hearing officers" in this case due to conflicting interests.

II. The interpretation by the Ohio Attorney General of Section 3301.031, Ohio Revised Code, has no rational basis for excluding all government employees from serving on the State Board of Education and

violates the equal protection clause.

III. The language of Section 3301.031, Ohio Revised Code, is unconstitutionally vague.

IV. Removal of an elected public official, because of the questions he asks and the opinions that he expresses, vilates the First Amendment.

V. Removal of an elected official in mid-term without following constitutionally authorized means violates the constitutionally protected voting rights of the electorate.

VI. The Hatch Act pre-empts Section 3301.031, Ohio Revised Code, because

state law frustrates a Federal purpose.

VII. The District Court abused its discretion in not affording injunctive relieve and ordering reinstatement and in not allowing an amended complaint and new trial.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Paul Brickner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 13, 1992 and

this proceeding on October 13, 1992 and the denial of a petition for rehearing filed and entered on December 3, 1992. Petitioner has been granted an extension of the filing deadline until May 2, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 977 F.2d 235-238, and the Order denying the petition for reconsideration are reprinted in the Appendix hereto. The Memorandum of Opinion and Order Overruling Plaintiff's Motion for a Temporary Restraining Order of the District Court for the Northern District of Ohio, and the District Court's findings of fact and conclusions of law, orally given and transcribed, and ORDER OF DISMISSAL are reprinted in the appendix.

JURISDICTION

This petition for certiorari was filed within the May 2d, 1993 deadline granted by this Court. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1). Jurisdiction in the District Court was founded on Title 28 U.S.C. Sections 1331 and 1343 and in the Court of Appeals under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Education, kindergarten through high school, is a $7,000,000,000.00 enterprise in Ohio, constituting approximately 1/3 of the state budget. In Ohio, thousands of ordinary citizens serve as members of the State Board of Education and more than 600 local school boards. Federal employees serve on local school boards.

All are elected by a vote of the people and perform these "thankless jobs" for little remuneration. State Boards of Education exist in 49 states. In many other states, local and state board members are elected officials. They provide accountability to the electorate for the vast education bureaucracy.

The opinion of the Sixth Circuit in this case places in jeopardy the right of those elected school board members to serve, speak out on sensitive issues, ask hard questions, and criticize their subordinates and employees without fear of vengeance, retaliation, punishment, revenge and removal. The opinion sets a terrible precedent, not only for elected school board members, but also for thousands of local elected officials who serve in low profile public service type offices (members of city councils, township trustees, etc). If the secretly

requested and prepared, unpublished letter of the Attorney General can remove an elected state official, why cannot courts say also that a county prosecutor can cause the removal of county officials and local school board members and that the opinion of a city law director/solicitor can cause the removal of mayors, city council members and local school board members?

But for this case, never in the 38 year history of the State Board of Education, has a member been removed during his term of office. The Ohio Constitution was amended in 1953 to create a State Board of Education to help eliminate excessive gubernatorial politics from the Ohio Department of education by replacing the Governor as the appointing authority of the Superintendent of Public Instruction and creating a board that would thereafter

select the Superintendent (Article VI, 4). Previously, the Governor had appointed the Superintendent. In 1955 enabling legislation was passed and the first Board was elected by a vote of the people. One member was elected from each of Ohio's 23 Congressional Districts.

The structure of good government at the Ohio Department of Education was simple. The Board members were elected by the people and were accountable to the voters. The Board set education policy and hired the Superintendent. The Superintendent effectuated the policy set by the Board and was in charge of the vast education bureaucracy of the Department, which employed some 600 to 800 people. The Superintendent was accountable to the Board.

REASONS FOR GRANTING THE WRIT

I.

Circumvention of an established "constitutionally permissible means" of removal of elected officeholders by substituting therefor an unauthorized means of removal that reduces or eliminates the officeholder's rights to notice and an opportunity to be heard violates the right to due process of law safeguarded by the Constitution of the United States.

a. Complete pre-removal process is due.

In Ohio,

> "[q]uo warranto is the exclusive remedy to try title

> to public office...." (79 O Jur3d, Quo Warranto § 5). Beasley v. City of East Cleveland, 20 Ohio App.3d 370, 373, 46 N.E.2d 859 (1984); see also, State ex rel. Albright v. Court of Common Pleas, 60 Ohio St.3d 40, 572 N.E.2d 1387 (1991).

The learned judges of the Sixth Circuit recognized that this case involves an elected public official, but they failed to draw any inferences or conclusions from that fact and merely treated removal of an elected official as if it were the full equal of termination of employment, as in an employer-employee relationship, or confused an elected official with an appointed official. Petitioner believes this neglect of the fact that petitioner was elected to serve

by a vote of the people and of the significance of quo warranto was a grave error. Public officials, including elected members of a state board of education, are employed by the people. They are not employees of the Governor, the Attorney General or the Department of Education. They are not employees of the State Board of Education. They certainly are not the employees of the Superintendent, rather the Superintendent is the Board's employee.

There is no supervisor and no personnel office that can give an elected member of Ohio's State Board of Education a termination notice. The employee termination cases provide good background to help answer the question of how much process is due. The same holds true for the fact that in Ohio teachers and administrators are entitled to due process hearings before decertification

and even contested land transfers between districts are entitled to due process hearings. Although these varying due process considerations are helpful background, they should not be dispositive of the due process required to remove an elected official.

Ohio has carefully circumscribed the means for removing an elected official, whether for wrongdoing or, as in the present case, to challenge and test the right to hold office by reason of a technicality. Since Ohio is a relatively typical state, it can be a representative example of "what process is due" in terms of the removal of an elected official from office.

Although state law does not prescribe the parameters of due process as a federal constitutional right, surely, because its jurisprudence derives

from the same fundamental Anglo-American principles, state law can be a reasonable exemplar of due process in these cases. The Sixth Circuit made no effort to consider the differences between a "mere employee", as to whom quo warranto is not available, and an elected office holder, as to whom a "pink slip" or lay off notice is not applicable.

The Supreme Court of Texas has said, "...a fundamental principle of our republican form of government is that every public officeholder remains in his position at the sufferance and for the benefit of the public, subject to removal from office by edict of the ballot box at the time of the next election, or before that time by any other constitutionally permissible means." (Tarrant County v. Ashmore, 635 S.W.2d 417, 421 (1982)).

This fundamental principle is stated in basic texts on quo warranto.

> However, a person actually obtaining office with the legal indicia of title is legally in possession thereof, and is a legal officer until ousted. Such an incumbent is an officer de facto if not de jure, that is, one who is in possession and discharging the duties thereof under color of authority. By "color of authority" is meant authority derived from an election or appointment, however, irregular or informal, so that the incumbent is not a mere volunteer. (65 Am Jur 2d, Quo Warranto, §23, Incumbency and user of the office).

The Ohio Constitution grants to the Supreme Court (Art IV §2(B)(1)(a)) and to the courts of appeals (Art IV § 3(B)(1)(a)) original jurisdiction to hear quo warranto cases. This means that the trial courts of the state are without jurisdiction to decide quo warranto cases. In other words, in Ohio removal of a seated elected official from office requires the votes of <u>at least two court of appeals judges</u>. We can infer that the constitutional authors wanted to insure that no officeholder be removed without a hearing before a panel of mature, experienced and senior judges.

The learned judges of the Sixth Circuit were wrong in stating, "The governor declared his seat vacant....", in the second sentence of the opinion. The Governor neither took nor was entitled to take such action. <u>Neither the Governor nor the Attorney General has</u>

the power or authority to "declare a vacancy". There is nothing in the law or Constitution of Ohio that authorizes either of these executive branch officers to perform what would be essentially a judicial procedure. They are without jurisdiction to undertake a declaration of vacancy in the office of a duly elected and seated public official. The District Court Judge also misapprehended this issue and believed erroneously that "the governmental actors...[could] proceed... by declaring the seat vacant and appointing someone else to fill it." No such authority exists.

Opinions of the Attorney General are merely opinions. In this case, the opinion of the Attorney General clearly was in error, because the Attorney General failed to disclose important legal authority (legislative history) directly adverse to the position he had

espoused and not brought forth by counsel for petitioner. Although the Attorney General likes to say his opinions have the force and effect of law, they can be superseded by any judge in Ohio. A municipal, county or common pleas judge can overturn the opinion of the Attorney General. Yet, under Ohio law, trial judges cannot remove an elected public official from office. Removal requires a quo warrant action in an appellate court. No where in the record is there authority for requests for Attorney General opinions to be treated as due process hearings. Nor is there authority for the opinion that it is proper or permissible to communicate with the Attorney General about a question under advisement.

We must look to the priorities and hierarchy of our governing structure. If

the opinion of the Attorney General can be overruled by a municipal or common pleas judge, and yet those judges do not have jurisdiction to hear a quo warranto proceeding, how can it be said that the Attorney General has jurisdiction to remove an elected official? Attorney General opinions are not self-enforcing or self-executing (just as the relation back doctrine in rem forfeiture cases is not self-executing, United States v. A Parcel of Land, 1993 WL 44241, 5 (U.S.)).

In a similar manner, no court has jurisdiction to hear an impeachment case under Ohio's Constitution. Impeachment for wrongdoing is by the House of Representatives with a trial by the Senate. Article II, §§ 23 & 24. The Senators must take a special "oath or affirmation to do justice according to law and evidence." Ohio's Constitution,

Art. II, § 38, provides for a statutorily created substitute for impeachment, that is, recall for misconduct. It requires a pre-removal hearing. If wrongdoers and officials accused of misconduct cannot be removed from office without a full pre-removal hearing before the Senate or a Court of law, how can the Attorney General maintain that his word can remove a seated official in his ninth year of office?

Our governmental structure, its parameters and hierarchy call for exhaustive pre-removal procedures for elected officials. Removal of elected officials is not merely the removal from office of a given individual, but also the erasing of an election by the people and removal of their chosen representative. In removal cases, extensive due process should be mandatory. In this case, the Attorney

General responded to petitioner's claim in his Court of Appeals brief that neither the Governor nor the Attorney General had the authority to remove an elected member of the State Board of Education by claiming that they did not cause the removal but that it happened by "operation of law." If they had any authority, it should have been cited chapter and verse.

In truth, and the Governor and the Attorney General acted in concert to remove petitioner from his seat on the State Board of Education, in his ninth year of service, at the behest and instigation of the Superintendent of Public Instruction and his allies on the State Board of Education. The only authority upon which the removal was based was the mistaken assumption of authority by the two highest ranking officials in the state, the Governor and

the Attorney General, whether in error or by willful malice.

Separation of powers is central to our democracy. Justice O'Connor has written:

> "The structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous[sic] society; it increases opportunity for citizen involvement in democratic processes; .... adopted by the Framers to ensure the protection of 'our fundamental liberties.' .... reduce the risk of tyranny and abuse." (Gregory v. Ashcroft, 111 S.Ct. 2395, 2399 (1991).

In doing the bidding of an entrenched bureaucrat, the Attorney General and the Governor usurped the authority of the appellate courts of Ohio and disenfranchised the voters.

b. Removing an elected official and then placing on that former official the burden of proof and the burden of going forward in seeking reinstatement violate due process.

The interest of the people in choosing public officials to serve them is contradicted by the concept of removal first with due process hearing to follow. Elected terms of office are limited. The wheels of justice often grind too slowly. A study of the failed impeachment attempts against President Johnson and Justice Chase demonstrated the importance to our democracy of the right of

officials to serve without fear of removal by those who disagree with their conduct or positions. This is even more true of part-time public service officeholders, such as school board members, who often hold other full-time positions of employment and lack the resources or time to contest removal and seek reinstatement through court action. Removing them without a full pre-removal hearing process places an additional burden on their ability to continue to serve the people. Moreover, in a close case the allocation of the burden of proof may determine the outcome of the case.

In this case, the Attorney General even stood by ready to deny to petitioner any right to seek redress in a court of law by the specious claim that petitioner's two elections were a nullity, that he had never been a member

of the Board, and that he had no rights to pursue in court. Justice White's footnote No. 5 in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 539 (1985) addresses the fallacy of that position. A good faith Attorney General's opinion might have said, this is our position, it can be contested by filing a stay in a specified tribunal and by seeking review in a specified tribunal within a stated number of days. The U.S. District Court's ruling also was in error pursuant to footnote 5.

c. The Governor and Attorney General should have recused themselves from serving as "hearing officers" in this case due to conflicting interests.

The Governor could not be objective in dealing with this case, because he had

caused a bill to be introduced and was on record as supporting legislation to give him the power to appoint the members of the State Board of Education, thereby taking away from the people the right to elect those board members. The Governor although an attorney did not exercise appropriate judgment, since he should have removed himself from the issue, had he been aware of the conflict.

The record shows that the Attorney General's office was involved in those legal matters about which petitioner inquired of the Superintendent: delays in informing the board about allegations of fraud and wrongdoing, audited findings of hundreds of thousands of dollars of misspent education dollars and nepotism. No only was the Board kept in the dark, a county prosecutor was "stonewalled" by the Auditor and Attorney General. Both Cully and Ross, the two education

assistant Attorneys General on the brief (Ross argued the case before the Sixth Circuit) appear in the record as it relates to the "known fraud" matters. Another assistant Attorney General is named in the nepotism issue. The Attorney General could not be impartial, because that office showed a bias in favor of the Superintendent. Would they accept telephone requests for legal opinions from local school superintendents seeking the removal of local school board members? Certainly not. As an interested party in these matters, the Attorney General could not exercise independent professional judgment and render legal opinion free from personal interests. Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971).

II.

The interpretation by the Ohio Attorney General of Section 3301.031, Ohio Revised Code, has no rational basis for excluding all government employees from serving on the State Board of Education and violates the equal protection clause.

Ohio has no rational basis for preventing all government employees from serving on the State Board of Education. The Ohio Attorney General's opinion interpreting Section 3301.031, ORC, in that manner makes government employees second class citizens and, thereby, violates the equal protection clause. United States v. Carolene Products, 304 U.S. 144 (1938).

Had the Attorney General disclosed and followed the legislative history, a rational basis for the language would have been a simple matter. Report of the Ohio School Survey Committee (May, 1955) showed that the consensus of the committee was to exclude from membership on the State Board of Education not all government employees, but "those who hold major appointive or elective offices in the state." This language was brought to the attention of the Sixth Circuit in the Petition for Rehearing. The report also recommended, at another point, that no government employees serve on the Board. However, the legislature did not enact that recommendation. Had it wanted to, it could have done so as surely, gracefully and effectively as it eliminated school employees from serving on the Board.

Attorney General Opinion 91-001 avoided any mention of the second portion of the subject sentence in RC 3301.031 that excluded from eligibility to serve on the State Board of Education "an employee or officer of any public or private school, or a public or private college, university, or other institution of higher learning...." Had 91-001 considered the section in its entirety or the full context of the sentence, the Attorney General's office could not have reached the conclusion that it did. It concluded that the "other public position of trust or profit" language meant both officer and employee. Taking the sentence in its entirety would then have required the Attorney General to explain why the legislature used different verbiage in the two portions of the same sentence to say the same thing. Moreover, if "public position of trust or

profit" means government employee or officer, then so much of the sentence that relates to public school and public university employees would have been redundant. Surely the different verbiage in the two portions of the same sentence meant that the legislature was speaking of two different categories. Common sense, when applied to the language, suggests that a "public position" is a high office, as contrasted with "employee" or "officer".

The Attorney General's office appears to have been eager to avoid detection of any ambiguity, because ambiguity would preclude its reliance on the plain meaning rule. Recognition of some ambiguity, or even a desire to doublecheck its conclusion because they were addressing the eligibility of a nine year veteran to hold office, would have caused the Attorney General's office to

look at legislative history and intent, the 36 year history of the State Board of Education and its many members who held full-time and part-time government positions, and comparable legislation, such as that pertaining to local school boards, where federal employees seem always to have served as equal citizens in their communities. Consideration of such matters would have caused the Attorney General's office to reach the completely opposite conclusion.

III.

The language of Section 3301.031, Ohio Revised Code, is unconstitutionally vague.

The language "any the public position of trust or profit" is no where defined in the Ohio Revised Code. It is

"nebulous" language subject to numerous interpretations by men and women of ordinary intelligence. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). These Attorney General opinions were requested in bad faith and issued in bad faith with the intention of silencing an elected public official and keeping him from asking questions and speaking out about misuse of taxpayer dollars and nepotism (a felony in Ohio).

One of petitioner's predecessors and one of his contemporaries on the Board were full-time government employees during their service (one was an employee of the Lake County Board of Elections, the other an employee of the Cuyahoga County Auditor). In modern day society, active people fill many roles. Of the 21 members during petitioner's tenure on the Board, at least 14 members held "any

other public position of trust or profit" as broadly defined by the Attorney General. Yet only petitioner was singled out, with laser-like efficiency, for removal.

The March Attorney General's letter is unfortunate for taking the law out of context from outdated authorities. Section 39 of M. Throop's "A Treatise on the Law Relating to Public Officers" (1892), cited in the letter, stands for the principle that it is the court which has the power to "declare" an office vacant, not an executive branch officer (Attorney General or Governor). Yet, the Attorney General cited this section for contrary authority to support the claim of "implied resignation."

IV.

Removal of an elected public official, because of the questions he asks and the opinions that he expresses, violates the First Amendment.

As a member of the bar with prosecuting and law enforcement experience at the Federal, state and local levels, including fraud prosecutions, it was natural that petitioner, during his tenure as Board President, would follow up on a matter that involved more than $400,000.00 of misspent education dollars and which had taken place in petitioner's district.

The legislature had charged the Board with the responsibility of decertifying school officials and teachers for wrongdoing or negligence.

"Known fraud" took place in one district between 1982 and 1987. The State Auditor completed a year long investigation and audit report in the spring of 1988. The State Board was not informed of any details of the matter until March 1990, despite knowledge of the problem by the Department of Education in early 1987 and by the Attorney General's office, at least as early as April 1989, when an F.B.I. agent wrote to Chris Culley about "known fraud." The extraordinary delay in informing the Board raises questions about obstruction of justice and obstruction of official business. Board members have responsibilities. This was an area for the Board's purview. The Superintendent and Attorney General were obligated to keep the board informed. In asking questions and speaking out, petitioner was doing so as an elected official on matters of general interest

and of wrongdoing certified by the Auditor that had taken place in the district from which he was elected. Bond V. Floyd, 385 U.S. 116 (1966).

Secondarily, as a member of the bar, it was natural that petitioner's attention would be caught by legal matters. When petitioner, during his service as President of the State Board of Education, learned that there is a law against nepotism in Ohio (with a felony penalty), it was in accord with his responsibilities that he would ask the Superintendent why the Superintendent had not told the State Board of Education about the existence of a nepotism law at the time, some two years earlier, he had informed the Board that his son had been hired by the Department of Education, would ask how his son's employment squared with the nepotism law, and would

ask for copies of any research or legal opinions.

V.

Removal of an elected official in mid-term without following constitutionally authorized means violates the constitutionally protected voting rights of the electorate.

Reynolds v. Sims, 377 U.S. 533 (1964) and other cases address the fundamental right of citizens to vote in our democracy. That right is meaningless if the elector's choice can be removed summarily by edict.

VI.

The Hatch Act pre-empts Section 3301.031, Ohio Revised Code, because state law frustrates a Federal purpose.

The Supremacy Clause and the Hatch Act, 5 U.S.C. Section 7321 et seq., set the parameters for "outside" activities by Federal employees. State law cannot restrict Federal employees from exercising their rights to participate fully in our democracy, merely because they are Federal employees.

VII.

The District Court abused its discretion in not affording injunctive relieve and ordering

reinstatement and in not allowing an amended complaint and new trial.

Deprivation of constitutional rights constitutes irreparable injury. Elrod v. Burns, 427 U.S. 373 (1976). In the interests of justice, leave to amend a complaint should be freely granted. Foman v. Davis, 371 U.S. 178 (1962). This case was "instinct" with First Amendment considerations. They were heard and tried. Amending the pleadings would merely have caused them to coincide with the evidence and arguments.

CONCLUSION

This case is instinct with First Amendment considerations and addresses the right of elected public officials to speak out, ask difficult questions and perform their responsibilities to the public without fear of revenge, retaliation or removal. The case also provides insight into the difficult issues of accountability for our bureaucracies and of agency action that evades judicial review. It demonstrates the chilling effect on our democracy of prolonged, unauthorized procedures to remove an elected official by circumventing the required judicial process. When an elected school board member is chased out of office for asking questions about falsification of fiscal records and waste of our education tax dollars on dog obedience training, only

the courts can tell the bureaucrats and executive branch officers that they have overstepped the rights of free citizens, rights protected by and enshrined in our Constitution.

Respectfully submitted,

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(*Petitioner is not proceeding in forma pauperis. Petitioner has been a member of the bar of this Court since 1982.)